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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER POLLARD, JR.,

Petitioner,

v.

REA MAGNET WIRE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals violated the established precedent of this Court in *Anderson v. City of Bessemer City*, 470 U.S. 564, (1985), by substituting its own judgment concerning the nature of plaintiff's proof at trial for that of the District Court which found plaintiff had proven a violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e), *et seq.*

2. Whether the Court of Appeals violated the established precedent of this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) by adding a fourth step to the *McDonnell Douglas* proof formulation for Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e), *et seq.*

LIST OF PARTIES

The caption of this case contains all the parties within the meaning of Rule 21.1(b) of the Rules of this Court.

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OPINIONS BELOW

The unreported District Court decision, dated October 24, 1986 is attached at A-1. The opinion of the Court of Appeals for the Seventh Circuit, hereafter Seventh Circuit, was issued on the 13th day of July, 1987. It is reported at 824 F.2d 557 (7th Cir. 1987) and a copy is attached to this Petition at A-21.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(c) of the Rules of this Court to review a decision of the Seventh Circuit which is in conflict with the applicable decisions of this Court regarding the proper scope of appellate review to be exercised by the Seventh Circuit and material elements of the *McDonnell Douglas* test.

The District Court had subject matter jurisdiction over this case pursuant to 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §1343. The Seventh Circuit had jurisdiction under 28 U.S.C. §1291.

This petition is timely filed within the ninety (90) day time period established by 28 U.S.C. §2101(c) and Rule 20.4 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

This case arose as a race discrimination case pursuant to 42 U.S.C. §2000(e) *et seq.* and 42 U.S.C. §1981. The only provision involved in this petition is 42 U.S.C. §2000(e) *et seq.* and the interpretive decisions of it by this Court and the Seventh Circuit.

STATEMENT OF THE CASE

This action commenced with the filing of Petitioner's Complaint on January 29, 1986. The case was tried to the Bench on September 29, 30 and October 1, 1986. The District Court, after hearing the evidence and assessing the credibility of the witnesses entered its Memorandum and Order of Decision and Entry of Judgment thereon on October 24, 1986 awarding petitioner $16,273.08 in backpay under 42 U.S.C. §2000(e), $5,000.00 in damages under 42 U.S.C. §1981, and other appropriate relief. The Seventh Circuit reversed in its Opinion dated July 13, 1987. A Petition for Reconsideration was filed on July 24, 1987 and was denied by the Seventh Circuit on August 3, 1987.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Oliver Pollard, Jr., (hereinafter Pollard) a black male, was as an hourly union represented employee of Rea Magnet Wire Company, Inc. (hereinafter "Rea") from November 8, 1978 to August 21, 1984.

Pollard had a documented history of injuries to his right ankle. On the morning of July 23, 1984, pursuant to Rea's established policy, Pollard called and told his foreman that having hurt his ankle the day before he would not be reporting for work. Thereafter Pollard called in on Tuesday, Wednesday, and Thursday, (July 24-26) and Pollard's sister called in for him on Friday (July 27) each time reporting Pollard's absence. The following Monday, Pollard was ordered to report to Rea's personnel manager, a white female, who placed Pollard on suspension without pay pending an investigation of his absence.

Over the course of the next month, Rea's personnel manager investigated Pollard's absence. She contacted airlines to see if Pollard had booked flights out of town. She contacted the Las Vegas tourism bureau in the hope of establishing that Pollard was in Las Vegas attending a body building competition. The investigation was entirely fruitless. Rea conceded it had absolutely no evidence Pollard was anywhere but at home with an injured ankle.

After the month long investigation, Pollard was fired. Ostensibly he violated Article 9, Section 4.F of the Collective Bargaining Agreement by being absent for a continuous period of five (5) scheduled work days without permission. Rea contended that Pollard's termination was mandated by its policy and that it had no discretion to do anything other than fire Pollard. Two years earlier, Rea adopted an attendance policy to curb absenteeism. If Rea had applied the absenteeism policy to Pollard's absence, he would have received a written warning rather than a discharge. Rea had no arbitrator's opinions or industrial practice which determined whether the absenteeism policy or the Collective Bargaining Agreement controlled in

situations like Pollard's. Rea could never explain why an investigation was necessary if Pollard's termination was compelled by the clear language of the Collective Bargaining Agreement.

Rea employed two other individuals, Dame and Gomez, who were also terminated for violating Article 9, Section 4.F of the Collective Bargaining Agreement. Neither Dame nor Gomez is black. Rea contended that they were comparable to Pollard. Dame was terminated after missing nine (9) days of work during which he claimed to be without transportation. Dame was not terminated until, on the seventh day of his absence, he was seen purchasing a new car and yet called in on days 8 and 9 still claiming to be without transportation. Dame was actually fired because his reason for being off work was patently false. Likewise, Gomez was fired for giving a patently false reason for absence. He claimed to be home sick yet an employee of Rea had heard that Gomez was a "missing person" while listening to his police monitor. Gomez was absent six days before his obvious charade was discovered, and he was terminated immediately. Neither Dame nor Gomez was put on suspension pending investigation.

After his termination, Pollard filed a claim for benefits with the Indiana Employment Security Division. After testimony was taken from both sides, Pollard prevailed. The Referee held, even after listening to Rea's claim that Pollard had violated Article 9, Section 4.F of the contract, that Pollard's discharge was without just cause. Pollard also initiated a complaint with the Fort Wayne Metropolitan Human Relations Commission, a duly authorized deferral agency of the Equal Employment Opportunity Commission. After its investigation, the Metropolitan Human Relations Commission of the City of Fort Wayne found "probable cause" to believe that discrimination had occurred, a finding which it makes in less than 10% of its cases.

After a two and one-half day trial to the District Court, the District Judge concluded that Rea had discriminated against Pollard on the basis of his race. After stating that an employer's

arbitrary, ridiculous or irrational rules do not form a basis for relief under Title VII unless applied discriminatorily (Appendix page 9) the District Court then found plaintiff had established a *prima facie* case of race discrimination, that the defendant had articulated a defense and that "The Court is persuaded, for the reasons articulated in "Rea's Rebuttal" that plaintiff has carried the burden of persuasion. Defendant's explantion is simply unbelievable. It is more likely that Rea was motivated by discriminatory reasons [for the discharge of Pollard] than the provision of its Collective Bargaining Agreement." (Appendix page 13).

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Opinion of the Seventh Circuit is Contrary to the Standard of Appellate Review Required by *Anderson v. City of Bessemer City*

The appropriate standard for appellate review of the District Court's findings of facts and conclusions of law is well known. Governed by *Fed. R. Civ. P. 52(a)*, and the Supreme Court's opinions in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) and *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), the Seventh Circuit must give great deference to the trial court's findings. *Anderson v. City of Bessemer City*, as a Title VII case, is squarely on point. This court held that the Seventh Circuit may not reverse, even though convinced that had it been setting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the District Court's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City*, 105 S.Ct. 1512-15.

The Seventh Circuit, in other decisions, has correctly adopted the teachings of this court in *Anderson*. In *Andre v. Bendix Corp.* 774 F.2d 787 (7th Cir. 1985) the court noted that the ultimate issue of discrimination in a Title VII case is subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a).

In this case, there are "two permissible views of the evidence". The view adopted by the District Court was that racial majorities are only fired at Rea upon incontrovertible proof that their reasons for absence are fabricated. Blacks, however, are fired when Rea believes, but cannot prove, that the absence is fabricated. This difference in approach to absenteeism in the workforce is clearly disparate treatment forbidden by Title VII.

The Seventh Circuit's opinion implicitly and explicity assigns much more benign motives to Rea's actions. The Seventh Circuit, concluded such starkly different treatment was a "mistake" in application of policy but not discrimination. Not only is the Seventh Circuit's conclusion a blatant reweighing of the evidence, but much worse, it is entirely inconsistent with Rea's own theory of the defense at trial. Rea never argued that any of its actions concerning Pollard's termination constituted a "mistake". Rather, Rea stoutly contended that each of its actions was mandated by its procedures and that it had no discretion in firing Pollard. Were "mistake" the issue, Pollard could have resonded at trial. It is indeed ironic that by virtue of the Seventh Circuit's refusal to follow the appropriate standard of appellate review, Pollard's verdict was reversed for reasons he was never able to contest at trial.

II.

The Opinion of the Seventh Circuit, in adding a fourth step to the *McDonnell Douglas* paradigm, violates the established precedent of this court and makes it essentially impossible for a plaintiff to win a Title VII case

It has been long established that the *McDonnell Douglas* paradigm of proof in a Title VII case consists of a three step process. Initially, plaintiff must make a *prima facie* case. Secondly, defendant must articulate a non-discriminatory reason for the employment action at issue, and finally plaintiff is entitled to show the defendant's purported reason is pretext. *McDonnell Douglas v. Green, supra.; Sweeney v. Board of*

Trustees of Keene State College, 439 U.S.24 (1978); and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Seventh Circuit's opinion establishes a "fourth step". The Seventh Circuit holds that in addition to proving "pretext", plaintiff must go one step further and prove a "pretext for discrimination" and disprove all other potentially pretextural reasons. This holding is entirely contrary to the established precedent of this court, and has no basis in either fact or in law. A review of the recent decisions of this court shows no such requirement of a fourth step. In *Burdine*, this court held that pretext could be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworth of credence." 450 U.S. at 256.

The opinions of this court have held that if pretext is shown, it is presumed to be pretext for discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) "Thus when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for employer actions, it is more likely than not that the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." 438 U.S. at 575-576.

The Seventh Circuit's rule is unsound on a theoretical basis because it imposes an impossible burden on plaintiff. By definition, proof of pretext means that plaintiff has convinced the court that defendant relied on motives other than those espoused by the defendant in the courtroom. The Seventh Circuit requires plaintiff to disprove all other motives even when, as here, they do not appear in the record. The case at bar illustrates this problem. Pollard proved, to the satisfaction of the District Court, that Rea's reliance on its Collective Bargaining Agreement for his termination was a pretext for race discrimination. At trial, Rea never claimed that its conduct constituted mistake or error. Had it so contended, Pollard could have prepared for the argument at trial. On appeal Pol-

lard lost to a factual argument never advanced by Rea at trial. This court cannot approve a rule of law that allows a defendant to prevail on an argument which it never made in the record.

The Seventh Circuit's formulation also makes no sense as a practical matter. At the root of the Seventh Circuit's formulation is its claim that employers often develop a pretext in order to disguise some other legal yet unpalatable reason for an employment action, eg., nepotism, personal dislike, etc. *Benzies v. Illinois Department of Mental Health*, 810 F.2d 146 (7th Cir. 1987). The Seventh Circuit's reasoning requires two erroneous assumptions:

1. That client and counsel will fabricate a reason for an employment action when it has a perfectly defensible (under Title VII) reason for the employment action such as personal dislike or nepotism.

2. That client and counsel will willingly expose themselves to sanctions under *Fed. R. Civ. P. 11*, by consciously hiding the real motivation for its employment decision and substituting a different, but still legal reason. As a practical matter, this seems unlikely.

CONCLUSION

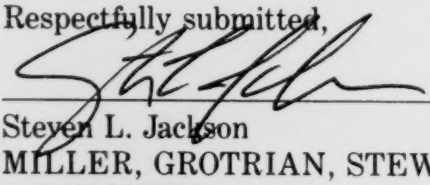
The Seventh Circuit clearly violated this court's standard for appellate review. When the District Court concluded that the evidence led to the conclusion that plaintiff had been terminated because of his race, the Seventh Circuit may not decide that plaintiff has only proven a mistake. By failing to have followed the appropriate standard of appellate review, the Seventh Circuit has reversed plaintiff's judgment on a basis never argued by Rea at the trial court.

The Seventh Circuit also erred by imposing a burden of proof not required by any decision of this court. By requiring Pollard to prove not only that Rea's reliance on its Collective Bargaining Agreement was a pretext, but to also negate all other possible reasons such as "mistake" for Rea's action, the Seventh Circuit imposed an impossible burden on Pollard. If there

is to be a fourth step to the *McDonnell Douglas* three-step paradigm, it must come by clear and unequivocal pronouncement of this court. Because such a fourth step makes no sense, either as a matter of theory or of practice, it should not become law.

For these reasons, this Court should issue a writ of certiorari to the Seventh Circuit, and then reverse the Seventh Circuit's opinion.

Respectfully submitted,



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Appendix

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

OLIVER POLLARD, JR.	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. F 86-44
	)	
REA MAGNET WIRE COMPANY, INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM DECISION AND ORDER

This matter is before the court for a decision on the merits following a bench trial. The court heard testimony on September 29-30, 1986 and final arguments on October 1, 1986. The court enters the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a), after having examined the entire record and having determined the credibility of witnesses; after viewing their demeanor and considering their interests.

FINDINGS OF FACT

Oliver Pollard, Jr. is a black male. He was born December 9, 1955. He was hired by Rea Magnet Wire Company, Inc. (Rea) on November 8, 1978 as an hourly employee. Pollard was qualified for his job and performed his work satisfactorily. Pollard worked at Rea until August 21, 1984, when he was terminated.

Rea is a corporation licensed and authorized to do business in Indiana. Each hourly employee of Rea was a member of Local 863 of the International Union of Electronic, Electrical, Tech-

nical, Salaried and Machine Workers, AFL-CIO. Rea negotiated a collective bargaining agreement with Local 863 which was in full force and effect from April 15, 1983 through April 15, 1986.

The collective bargaining agreement contained a provision relating to termination of seniority.

> All seniority and employment of an employee shall terminate if any of the following occur during the term of this agreement:
>
> . . . F. The employee is absent for a continuous period including five (5) scheduled work days without permission unless it was not reasonably possible for the employee to request such permission of the company. . . .

This provision is identical to the provision contained in previous collective bargaining agreements dating back to 1977.

In 1982 Rea instituted an attendance policy to curb absenteeism. Under the policy each employee was given six (6) positive points. An additional three (3) points were added each month an employee worked with no tardiness or absence. Two (2) points were deducted for each instance of tardiness or leaving early and six (6) points were deducted for each absence, and for other failures. The discipline system is as follows:

> Six (6) negative points equals a verbal warning.
>
> Twelve (12) negative points equals a written warning.
>
> Eighteen (18) negative points equals a three (3) day suspension.
>
> Twenty-four (24) negative points equals a five (5) day suspension.
>
> Thirty (30) negative points equals termination.

The policy defines an absence as:

> An instance of an absence is any full scheduled shift including overtime if scheduled or accepted. Consecutive shifts of absence, however, is considered one instance. (1)

> If an employee is absent Tuesday, Wednesday, Thursday, Friday, and Monday (no Saturday or Sunday work scheduled), that is, six (6) points total.

The attendance policy, by its own language, clearly contemplates absences of five (5) days.

Oliver Pollard did not report to work the week of July 23, 1984. On the morning of July 23, 1984, Pollard called Rea and spoke to Foreman John Young. Pollard told Young that he would not be in for "personal reasons" and that he had an injured ankle. Pollard also called in on Tuesday and told Merlin Feasby that he would not be in, but did not mention his ankle. Pollard called in on Wednesday and told Kim Everson that he would not be in, but did not mention his ankle. Pollard called in again on Thursday and talked to Feasby again and told him he would not be in and did not mention his ankle. Pollard's sister called in for him on Friday, July 27, 1984. Rea's foreman did not indicate to Pollard that he needed an additional excuse or justification for being off.

When Pollard's sister called in on Friday she was told to tell Oliver to contact Personnel Manager Susan Vachon before reporting to work on Monday, July 30, 1984. Pollard and his union representative met with Vachon on Monday, July 30, 1984. When Vachon asked Pollard why he had been absent Pollard said that he was out during the week with an ankle injury. Prior to the July 30, 1984 meeting, Vachon had not been told of Pollard's ankle injury. No one told Pollard to get a medical excuse. Pollard was then placed on suspension without pay pending an investigation.

Pollard is a body builder. In July of 1983 Pollard was granted leave to compete, as Mr. Fort Wayne, in an out of state body building competition. In June of 1984, Pollard requested a leave of absence for the week of July 23, 1984, so that he could take care of some personal business.[1] Vachon denied Pollard's request for a leave of absence.

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[1] There is some dispute as to whether the leave was for the entire week and whether it was requested so that Pollard could attend to personal business or attend a body building event. After assessing the demeanor and testimony of various witnesses, the court concludes that Pollard only requested a two to three day period to take care of personal business.

Vachon did not believe that Pollard's ankle was injured. Vachon believed that Pollard took the week of July 23, 1984 off to attend the body building event. She conducted the investigation to determine whether Pollard had gone to the out of state event. Vachon contacted airlines to see if Pollard had booked any out of town flights. She also contacted a Las Vegas tourism bureau and asked about weight lifting or body building shows. The investigation was fruitless.

Pollard was ostensibly fired for violating Article 9, §4(F) of the collective bargaining agreement, for being absent for a continuous period including five (5) scheduled work days without permission. Under this provision, Pollard could have been terminated during the Monday, July 30, 1984 meeting. No satisfactory reason was given for placing Pollard on suspension when he could have been fired on July 30, 1984. Pollard would not have been fired if he had brought in a medical excuse. Vachon never told Pollard that he needed an excuse or that his job could be saved by bringing one in.

Pollard had been treated at Rea for ankle problems prior to July 23, 1984. He saw a company doctor on July 13, 1981, who diagnosed Pollard as having osteochondritis dissecans, a loose piece of cartilage, in his right ankle. On July 16, 1981, Rea's doctor diagnosed a bruised hematoma of the right ankle and ordered daily whirlpools. In August of 1981, Pollard was given light duty for thirty (30) days because of a ligament injury to his right ankle and the company nurse indicated that he needed a brace. Pollard reinjured his ankle on July 8, 1984, when he jumped out of the bed of a pick-up truck. He went to Rea's dispensary on July 9, 1984, where he was seen for injury to his ankle.

Pollard was at home during the week of July 23, 1984, with the ankle injury he had sustained on July 22, 1984. On July 22, 1984, Pollard was carrying four bags of groceries up the stairs to his house when his ankle "gave out" again. The management at Rea did not believe that Pollard had an ankle injury.[2]

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[2] After assessing Pollard's demeanor, the evidence relating to his previous ankle injuries, and the complete lack of any evidence to the contrary, this court accepts Pollard's testimony as true, and concludes that Pollard was off for an ankle injury.

The management of Rea did not believe Pollard because of an earlier incident involving a back injury, and because Pollard's injury coincided with his requested leave, which was denied. In early 1983, Pollard was off work with a back injury. Steve Cadwallder saw Pollard at a health spa lifting weights while he was off work. Cadwallder concluded that Pollard had not really hurt his back. Personnel Manager Al Hyman also knew that Pollard had been lifting weights while off with the injury. It is clear that Pollard's back was actually injured while he was off work in 1983.[3]

On August 8 and September 14, 1984, IUE Local 863 filed grievances on Pollard's behalf for his suspension and termination. Both grievances were filed beyond the five (5) working day limit and were denied as untimely. As a result of its untimeliness, Local 863 paid Pollard $2,000.00 to settle Pollard's claim against the union for lack of representation.

After his discharge, Pollard filed a claim for unemployment compensation with the Employment Security Division of Indiana. The Division ruled that Pollard's discharge was not for just cause. The referee concluded that the record failed to establish that Rea had published any procedures for obtaining permission to be off work. The referee also noted that Rea had been contacted each of the five days Pollard was absent.

Donald Dame and Thomas Gomez are former employees of Rea Magnet. Both Dame and Gomez were fired pursuant to Article 9, §4(F). However, neither Dame nor Gomez can be compared with Pollard. Dame's reason for missing work was patently false. Dame was absent from work on May 7, 8, 9 and 11 and May 14 through 18. While he claimed to have been without transportation, he had purchased a new car on May 16, which he was driving on May 18.[4] Dame was fired because his reason of being off work was patently false.

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[3] Pollard's injury and illness record makes it clear that his back was injured while he was off work. Rea did not challenge the veracity of Pollard's claim that he was injured. Rea only challenged Pollard's receipt of workmen's compensation for the entire time that he was off, because he had failed to follow the doctor's prescribed treatment. Pollard was suspended for three days for failing to follow the treatment.

[4] In response to a grievance relating to Dame's termination, Vachon concluded that Dame's "negligence" (his obvious lying) was without excuse.

(Like Dame, Gomez was lying). While Gomez claimed to be home sick, Al Hyman heard that Gomez was a "missing person" while listening to his police monitor. Unlike Pollard, Gomez was absent six (6) days and only called in twice to report his absence. While he was supposed to be home sick, he went to the credit union to get some extra money for groceries. Unlike Pollard, neither Dame nor Gomez were put on suspension pending investigation. Both Dame and Gomez received notice of their termination by certified mail from Vachon, without being placed on suspension. Pollard was on suspension pending the investigation from July 30, 1984 through August 21, 1984, when he finally was notified of his termination.

There is nothing in Rea's written policies defining the term "without permission," as it is used in the collective bargaining agreement. Rea's written policies do not indicate that the absentee policy superseded, suspended or abrogated the collective bargaining agreement. From 1982 to 1985, Rea terminated employees under the absenteeism policy; however, no employee had absences of five (5) consecutive days. Pollard had been disciplined under the absenteeism policy prior to his discharge and at the time of his discharge had nine (9) negative points. Had Pollard been disciplined under the absenteeism policy, he would have received another six (6) negative points, giving him total of fifteen (15) negative points.

Pollard's total wage loss from July 30, 1984 through December 31, 1985 amounted to $24,507.60. Pollard received other wages in 1985 totalling $4,234.52. He also received $2,000.00 from the union in settlement for his claim of inadequate representation. Pollard's 1984 wages from other sources totalled $2,000.00, giving a total deduction of $8,234.52, making his entire claim for wages $16,273.08.[5]

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[5] Defendant agreed that plaintiff's wage loss calculation was accurate with the exception of a claim for fringe benefits in the amount of $2,450.76 and the 1984 wages. The plaintiff agreed to omit the fringe benefit figure. After hearing the testimony assessing the credibility of the witnesses, the court agrees with the defendant that the 1984 wages made by the plaintiff should be increased from $1,500.00 to $2,000.00, reflecting a total deduction of $8,234.52.

It was humiliating for Pollard to tell his children that he had been fired. He was unable to buy Christmas or birthday presents for his children. As a result of his termination, his utilities were cut off and his ex-wife threatened him with contempt citations for non-payment of child support. Pollard was sued by Rea's credit union, Lincoln National Bank, and Fort Wayne Federal Credit Union, for failing to make loan payments. The Pollards' gas was cut off and they had to borrow a kerosene heater to heat their home. After his discharge, Oliver Pollard experienced a dramatic behavioral change; he became moody and was very unhappy. His children had to go to this parents' house to take showers.

CONCLUSIONS OF LAW

This court has jurisdiction over the subject matter of this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and under §1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981. The court has jurisdiction over the parties. Defendant Rea is an employer within the meaning of Title VII.

This is a claim for employment discrimination on the basis of race. There are no issues regarding the timeliness of plaintiff's complaint or plaintiff's compliance with administrative procedures prior to filing the complaint. Pollard is a black male. This is a disparate treatment case. Pollard claims that his discharge was racially motivated.

Pollard has the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff[.]" *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The framework of analysis of Title VII claims is well established.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an oppor-

> tunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). *Accord United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

The plaintiff's burden at the prima facie phase of analysis is to prove the relative objective qualification of the job at issue. *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986); *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985). "By removing subjective job requirements from the prima facie phase of analysis, the plaintiff may create a rebuttable presumption of discrimination without direct proof of subjective intent." *Id.* In the second phase of analysis, the defendant is given the opportunity to articulate some legitimate, non-discriminatory reason for its employment action. "The legitimate purpose of this evidence is to 'allow the trier of fact rationally to conclude that the employment decision [was not]motivated by a discriminatory animus.'" *Coates v. Johnson & Johnson*, 756 F.2d 524, 531 (7th Cir. 1985) (quoting *Burdine*, 450 U.S. at 257). *See also Nellis v. Brown County*, 722 F.2d 853, 857-58 (7th Cir. 1983). The third phase of analysis, if reached, requires that the plaintiff attempt to persuade the court that the defendant's explanation is "unworthy of credence" or that "a discriminatory reason more likely motivated" the defendant. *Burdine*, 450 U.S. at 256. The plaintiff always retains the ultimate burden of persuasion. *Id.*

"[C]ourts often must rely on circumstantial evidence of employer motivation in employment discrimination cases." *Hearn v. R.R. Donnelley & Sons Co.*, 739 F.2d 304, 306 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1214 (1985). A district court cannot require a plaintiff to submit direct evidence of discriminatory intent. *Aikens*, 460 U.S. at _____ n.3, 103 S.Ct. at 1481 n.3 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)). *See also Burdine*, 450 U.S. at 256 ("The plaintiff retains the burden of persuasion.

[H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.") The question to be decided in a Title VII case is the "ultimate question of discrimination *vel. non.*" *Aikens*, 460 U.S. at 714. "The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. The district court must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 714. When the district court has heard and received all of the evidence in a case, it need not determine whether the plaintiff has actually made out a prima facie case, but may proceed to engage in this factual inquiry into the ultimate question of discrimination. *Id.* at 714-15; *Suson v. Zenith Radion [sic] Corp.*, 763 F.2d 304 (7th Cir. 1985).

When §1981 is used as a parallel basis for relief with Title VII, its elements are identical to Title VII. *Lincoln v. Board of Regents of University System*, 697 F.2d 928, 935 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983); *Pinkard v. Pullman Standard*, 678 F.2d 1211, 1224 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Flowers v. Crouch Walker*, 552 F.2d 1277 (7th Cir. 1977); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

An employer's arbitrary, ridiculous and irrational rules do not form the basis of relief unless applied discriminatorily. *Smith v. Monsanto Chemical Co.*, 770 F.2d 719 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1273 (1986). An employer may terminate an employee "for a good reason or a bad reason so long as a discriminatory or illegitimate motive is not involved." *Epps v. Continental Can Co.*, 22 Empl. Prac. Sec. (CCH) ¶30683 (M.D.N.C.), *aff'd without opinion*, 661 F.2d 920, 25 Empl. Prac. Sec. (CCH) ¶31798 (4th Cir. 1981), *cert. denied*, 454 U.S. 900 (1981). When reviewing a discrimination claim a court must determine whether an employer's policies were applied in a discriminatory manner and not whether they were reasonable. *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1184 (11th Cir. 1984).

I.

The Prima Facie Case

In the Seventh Circuit a prima facie case, in a wrongful termination case, is established by evidence that the general quality of an employee's work is satisfactory. *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 512 (7th Cir. 1986). There is no question that Pollard's work was satisfactory. His records indicate that his work was satisfactory. As a body builder Pollard was particularly well qualified for some of the work he performed. Bruce Reinders testified that while he worked with Pollard at Rea they had to pull pallets (loaded with wire) with a hand jack for distances of fifty feet. There was virtually no evidence suggesting that Pollard was unqualified or that his work was unsatisfactory.

Pollard established a prima facie case of discrimination. Proof of a prima facie case entitles plaintiff to an inference of discrimination; it is not a factual finding to that effect. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The burden now shifts to Rea to articulate a legitimate, non-discriminatory reason for discharging Pollard.

II.

Rea's Rebuttal

Rea offered a legitimate, nondiscriminatory reason for discharging Pollard. Rea claims that Pollard violated the collective bargaining agreement by missing five work days without permission. The court now turns to the central issue in this case; whether Rea's explanation for discharging Pollard is pretextual or not worthy of credence. *Burdine*, 450 U.S. at 256; *Suson*, 763 F.2d at 308. The evidence shows that Rea's explanation is pretextual and not worthy of credence.

Rea introduced evidence showing that Rea had terminated two other employees pursuant to the same provision of the collective bargaining agreement that Pollard was terminated under to support its explanation. Donald Dame had missed

nine days of work, claiming to be without transportation. Thomas Gomez missed six days of work, claiming to be home sick. While Pollard was ostensibly terminated for missing five days of work, neither the termination of Dame nor Gomez can be compared to Pollard's.

The evidence clearly showed that both Dame and Gomez had given patently false reasons for missing work. While Dame claimed to be without transportation he was seen driving a new car which he had purchased while he was off work. Gomez was also lying. While he claimed to be home sick Gomez was actually out and around. Pollard's reason for missing work, however, was true. He was home with an injured ankle.

The Dame and Gomez discharges are distinguishable from Pollard's in another respect. Vachon, who was responsible for Pollard's termination, did not discharge Pollard immediately after he had missed five days of work. Rather, she put Pollard on suspension pending an "investigation." During Pollard's suspension Vachon contacted airlines and a tourism bureau to find out whether Pollard had attended an out of town body building show. Vachon testified that she did not believe that Pollard was at home with an injured ankle. The evidence shows that Pollard's reason for being absent was true, despite Vachon's belief to the contrary. In a nutshell, both Dame and Gomez were caught red-handed; Pollard was not. The investigation was conducted so that Vachon could prove that Pollard, like Dame and Gomez, was lying. When the investigation turned up nothing Pollard was fired anyway, even though unlike Dame and Gomez, Pollard was off for a legitimate reason.

If the real reason for firing Pollard was that he had violated the collective bargaining agreement he could (and should) have been fired on Monday, July 30, 1984, during his meeting with Vachon. No satisfactory reason was offered by Rea for not firing Pollard on that date. Dame and Gomez were fired for lying. Pollard was put on suspension so that it could be shown that he too was lying. He was not lying but was fired anyway.

There is other evidence to show that Rea's explanation is pretextual or not worthy of credence. The evidence showed that Pollard had an established record of discipline under the attendance policy. At the time of his discharge Pollard had nine (9) negative points. He would have received six (6) negative points for his absence, which equals a written warning (hardly discharge). As Rea correctly points out it can terminate an employee arbitrarily, so long as it does so without discriminating. *Smith*, 770 F.2d at 719. While not direct evidence of discrimination Rea's choice to discharge Pollard under the collective bargaining agreement, rather than to discipline Pollard under the absenteeism policy, is further evidence that Rea's explanation is not worthy of credence.

Lastly, the provision of the collective bargaining agreement Pollard was fired under allows Rea to terminate an employee who is absent for five continuous days "without permission." On July 23, 24, 25, and 26, 1984, Oliver Pollard called in and told Rea that he would not be in. On Monday, July 23, 1984, Pollard not only reported that he would not be in, but told Foreman John Young that he had an ankle injury. Pollard's sister called in for him on Friday, July 27. While Rea claims that Pollard missed five days "without permission," the evidence shows that Rea has no written procedures for obtaining "permission" and no written policies defining "without permission." For that reason, the Referee of the Employment Security Division of Indiana ruled that Pollard's discharge was not for just cause. The Division's ruling and the evidence presented at trial further show pretext. If Pollard's termination was actually for missing five days "without permission" then Rea should be able to answer the question: what does "without permission" mean?[6]

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[6] The evidence shows that Rea has no written documents defining the phrase "without permission." Vachon testified that Pollard would not have been fired if he had presented a medical excuse. There are no written policies to that effect. Furthermore, Vachon never told Pollard that he could have saved his job by presenting a medical excuse. If "without permission" means without medical excuse, and if Pollard was fired for not having an excuse, someone should have told Pollard that he could have saved his job by getting a doctor to substantiate his injury. He could have done this during the "investigation." While Rea's ambiguous collective bargaining agreement has severe consequences, its ambiguity is not per se evidence of discrimination. *Smith*, 770 F.2d at 719. It is, however, evidence of pretext.

When a defendant articulates, as Rea has, a legitimate, nondiscriminatory reason for its actions the factual inquiry proceeds to a new level of specificity and the plaintiff must persuade the court that the defendant's explanation is "unworthy of credence" or that "a discriminatory reason more likely motivated" the defendant. *Burdine*, 450 U.S. at 256. Plaintiff retains the ultimate burden of persuasion. *Coates v. Johnson & Johnson*, 756 F.2d 524, 531 (7th Cir. 1985). The court is persuaded, for the reasons articulated in "Rea's Rebuttal" that plaintiff has carried the burden of persuasion. Defendant's explanation is simply unbelievable. It is more likely that Rea was motivated by discriminatory reasons than the provision in its collective bargaining agreement.

EVIDENTIARY MATTERS

During the course of trial the court promised to give further attention to a number of evidentiary rulings. The court admitted the findings of the Indiana Employment Security Division. The court conditionally admitted Bruce Reinder's testimony as to Susan Vachon's reputation among workers at Rea. The court also conditionally admitted Duval Bailey's testimony regarding the cases of Sim Nelson and Curly Johnson (to show that Vachon had a history of disparate treatment against blacks) and Bailey's testimony that Vachon is prejudiced towards blacks generally and black males specifically. Upon further consideration, the court now holds that among those things mentioned, only the findings of the Indiana Employment Security Division are admissible; the other evidence is not admissible and therefore has not been considered in this court's decision.

Defendant objected to the findings of the Indiana Employment Security Division on the grounds that it is hearsay and is irrelevant.[7] Defendant points out that the issue before the

[7] Originally defendant was also contending that the document was not authentic. This objection was withdrawn during trial.

Division was whether Pollard's termination was for "just cause" and not whether Rea discriminated against Pollard. *See* e.g. I.C. 22-4-15-1 (just cause includes knowing violation of uniformly enforced rule). Generally, the admission of administrative agency findings rests within the sound discretion of the trial judge. *Johnson v. Yellow Freight Systems, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984). If the document is trustworthy within the meaning of Fed. R. of Evid. 803(8)(c), does not impair the judge's duty to try the case *de novo*, and is more useful than prejudicial, then it may be admitted. *Tulloss v. Near North Montessori School.*, 776 F.2d 150, 152 (7th Cir. 1985). Plaintiff offered the findings (two pages) to show that defendant's explanation was pretextual, that Rea had fired Pollard for being off "without permission," but had nothing defining "without permission." Pretext is at the heart of this case. The findings are clearly relevant, are not prejudicial, and were properly admitted.

Bruce Reinder's testimony that Vachon had a reputation among workers at Rea for being prejudiced against blacks is not admissible. Plaintiff argues that the testimony is admissible under Fed. R. of Evid. 404(a)(1) and 405. Rule 404(a)(1) is not relevant. That rule only applies to the character of the accused in a criminal case. Rule 405 also misses the mark, as it only allows testimony as to reputation when character evidence is otherwise admissible. Under Rule 608(a), reputation testimony is admissible to attack the credibility of a witness if the testimony refers only to character for truthfulness after the character of a witness has been attacked by reputation evidence. Reinder's testimony was both vague and scant; "Vachon's reputation preceded her." Even if it qualified under Rule 608, it fails to meet the test of Rule 403. Since Reinder's testimony has so little probative value, it is inadmissible and will not be considered in this decision.

Duval Bailey, Chief Investigator of the Fort Wayne Metropolitan Human Relations Commission (FWMHRC) was (conditionally) allowed to testify that in two prior cases (Sim Nelson and Curly Johnson), he had found probable cause against the

Fort Wayne Public Transportation Company, while Vachon was employed in a personnel position. Defendant argues that testimony regarding these prior cases is hearsay (not within Rule 803 (8)(c)), that the testimony is not relevant to prove character under Rule 404, and that the testimony should be excluded under Rule 403. Bailey's testimony is not hearsay. Bailey's testimony as to the Sims and Nelson cases was not offered to prove the truth of the matters asserted, but to show Vachon's racial attitudes. *See* e.g. *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1423 (7th Cir. 1986). Rule 404(b) is not relevant. That rule refers to bad acts of a defendant, *Hunter*, 797 F.2d at 1424, and precludes evidence of a defendant's bad acts to show that he acted in conformity therewith. Vachon was not employed by Rea during the pendency of the Sims and Johnson cases. Even if Rule 404(b) applied, it would not bar the testimony, which is admissible under the rule to prove "motive, opportunity, intent. . . ." While the testimony is not barred under Rule 404 or as hearsay, it cannot pass the test of Rule 403. Bailey's probable cause determination as to Johnson was not upheld by the hearing officer. Bailey's probable cause determination as to Nelson was also reversed by the hearing officer, although the hearing officer's finding of no probable cause was itself reversed by the FWMHRC, which was ultimately held arbitrary and capricious by the Allen Circuit Court, as to Nelson's termination. The rocky road of the Nelson case puts the significance of Bailey's probable cause recommendation in serious doubt. While it may be relevant, Bailey's testimony as to Nelson and Johnson is without much probative value and will be excluded under Rule 403 and is not entitled to consideration by this court in its determination.

There is one last evidentiary issue. Bailey was conditionally allowed to testify that in his opinion Vachon is prejudiced against black males. Vachon's racial attitudes are obviously relevant. The Federal Rules of Evidence allow opinion testimony if it is based on perception and helpful to the determination of a fact in issue. Fed. R. Evid. 701. Bailey's "opinion," as cross-examination revealed, was based only on his "gut feeling."[8] Since Bailey's opinion was not rationally based on his

[8] Bailey distinguished his "opinion" from his "professional conclusion." His "professional conclusion" was based on the Nelson, Johnson, and Pollard cases. His opinion was based on his "gut feeling."

perception it is not admissible under Rule 701. Bailey's opinions therefore are not entitled to consideration by this court.

REMEDIES

I.

Back Pay and Pollard's Duty to Mitigate Damages

Having determined liability in the plaintiff's favor, the court now turns to the question of appropriate monetary relief. Pollard seeks lost wages, compensatory damages for emotional distress, as well as costs and attorney fees. Lost wages are recoverable under both theories on which Pollard prevailed. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (§1981); *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387, 1389 (S.D.Ind. 1982) (wrongful discharge). The liability established by plaintiff entitles him to an award of back pay. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Hunter*, 797 F.2d at 1425. Defendant agrees that plaintiff's total wage loss, as calculated in the "Plaintiff's Title VII Damage Calculation," is $24,507,60.[9]

Congress, however, has provided that "interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. §2000e-5(g). After the employee establishes the amount of damages he seeks in lost wages, the employer has the burden of proving that he failed to mitigate those damages, in order to have the award reduced. *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1307 (7th Cir. 1984). To meet this burden, the employer must show that: (a) the plaintiff failed to exercise reasonable diligence to mitigate his damages, and (2) there was a reasonable likelihood that plaintiff would have found comparable work by exercising reasonable diligence. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665

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[9] Defendant objected to the inclusion of $2,450.76 in fringe benefits which the plaintiff agreed to omit and which the court's figure omits.

F.2d 149, 159 (7th Cir. 1981). Pollard's wage claim must be reduced by $8,234.52 in order to mitigate his damages.[10] Thus, Pollard is entitled to $16,273.08 for back pay.

II.

Compensatory Damages for Emotional Distress

Compensatory damages for humiliation and emotional distress suffered by an employee subject to illegal discrimination are recoverable. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). *See also Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1313 (7th Cir. 1985), and cases cited therein. Pollard suffered humiliation and emotional distress as a result of his termination. The evidence shows that it was humiliating for him to tell his children that he had been fired. His utilities were cut off and the Pollards had to borrow a kerosene heater to heat their home. He was unable to buy Christmas or birthday presents for his children. His children had to go to his parents' house to take showers. His behavior changed and be became moody and was very unhappy. There was no evidence of any out of pocket expenses resulting from these circumstances. The court determines that plaintiff is entitled to a $5,000.00 award of compensatory damages.

III.

Prejudgment Interest

Interest on wages that are due and owning is an available remedy to a plaintiff in a Title VII case, and can be awarded in the discretion of the trial court. *Hunter*, 797 F.2d at 1425-27; *Taylor v. Phillips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979). Such an award makes the plaintiff whole by reimbursing him for the lost use of the money to which he was entitled. The court finds that an award of prejudgment interest is justified in this case.

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[10] The "Plaintiff's Title VII Damage Calculation" included deductions totaling $7,734.52 for 1985 wages ($4,234.52), a settlement with the union ($2,000.00) and 1984 wages ($1,500.00). Defendant contends that Pollard's 1984 wages totalled $2,000.00 rather than $1,500.00. A fair estimate of plaintiff's income from the end of September 1984 until 1985 can be obtained from the plaintiff's income in early 1985. The plaintiff's 1984 wages, from this estimate, must be increased by $500.00, reflecting the total deduction of $8,234.52.

There have been a wide variety of methods employed in determining the rate of prejudgment interest for Title VII cases. *See EEOC v. Wooster Brush Co. Employees Relief Association*, 727 F.2d 566, 579 (6th Cir. 1984), and cases cited therein. This court follows the methodology set forth in *Dependahl v. Falstaff Brewing Co.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). That case, involving a violation of the ERISA statute, held that the rate of prejudgment interest is a question of federal law when the cause of action arises from a federal statute, *id.* at 1218, and found that the federal statute for postjudgment interest, 28 U.S. §1961, was the most appropriate statute from which to calculate the rate of prejudgment interest. That statute computes the rate of interest as the

> rate equal to coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty two week United States Treasury bills settled immediately prior to the date of the judgment.

That rate is currently 5.75%, and thus Pollard will be awarded prejudgment interest at that rate. Given the amount of back wages due, the court finds the total amount of prejudgment interest to be $2,391.02.[11]

IV.

Attorney Fees

Pollard is also entitled to his reasonable attorney's fees, 42 U.S.C. §2000e-5(k); 42 U.S.C. §1988, and his reasonable costs. 28 U.S.C. §1920. The considerations relevant to computing a reasonable attorney's fee award have been set forth by the United States Court of Appeals for the Seventh Circuit in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). Pollard has not submitted a

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[11] This amount represents the interst accrued through monthly compounding of the interest generated by the amount of wages due. The court calculated the monthly balance of wages due beginning July 30, 1984 until December 31, 1985, and computed the interest due at the end of each month, adding that interest to the monthly balance due. The $2,391.02 figure represents the sum of the interest amounts so generated.

request for fees detailing the amount his attorney seeks under these provisions, and thus the court cannot enter an order setting forth the amount of the award. Plaintiff will be ordered to submit a motion to the court within twenty (20) days from the date of this order setting forth detailed information justifying his request for fees.

This memorandum of decision contains the court's Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure. *See Rucker v. Higher Education Aids Board*, 669 F.2d 1179, 1183-84 (7th Cir. 1982).

CONCLUSION

Plaintiff has established by a preponderance of the evidence that his discharge was discriminatory, in violation of Title VII and §1981. Defendant is ORDERED to pay the plaintiff $16,273.08 for lost wages; $5,000.00 for emotional distress; and $2,391.02 for prejudgment interest. Plaintiff is ORDERED to file a motion for fees and costs within twenty (20) days from the date of this order, detailing his request for fees and costs.

Enter: October 24, 1986.

/s/ William C. Lee
William C. Lee, Judge
United States District Court

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2935

OLIVER POLLARD, JR.,

Plaintiff-Appellee,

v.

REA MAGNET WIRE COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. F 86-44—William C. Lee, *Judge.*

ARGUED MAY 20, 1987—DECIDED JULY 13, 1987

Before FLAUM, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Oliver Pollard, a body builder holding the title "Mr. Fort Wayne", asked his employer to let him take time off during the week of July 23, 1984, so that he could attend a body-building event in Las Vegas. Rea Magnet Wire Co., the employer, said no. On July 23 Pollard did not appear for work. He called a supervisor and reported that he had "personal reasons" and an ankle injury. Pollard or his sister called in on each of the next four days, telling Rea that Pollard would not appear but not giving a reason. The management of Rea—suspicious not only because of the request for leave but also because during an earlier absence on account of a

back injury Pollard had been seen lifting weights in a local gym (for which he was suspended three days)—called Pollard into the office before the start of work on July 30. Pollard said that he had been absent because of an ankle injury but did not bring an explanation from his physician. He was suspended on the spot and later fired. The district court held a bench trial and concluded that Pollard was unable to work the week of July 23 because of an injury. He ordered Rea to pay Pollard almost $19,000 for lost wages and interest and $5,000 for emotional distress.

If the only question were whether Pollard was injured, we would accept the judge's conclusion without hesitation. But no federal rule requires just cause for discharges. *NLRB v. Loy Food Stores, Inc.*, 697 F.2d 798, 801 (7th Cir. 1983). Pollard collected unemployment insurance after the state concluded that Rea lacked good cause to fire him, and he collected $2,000 from his union after the union negligently failed to take Pollard's case to arbitration. The only conceivable federal claim is based on Pollard's race. He is black, and he filed this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981. The district court found that Rea intentionally discriminated against Pollard because of his race. Unfortunately for Pollard, there is no evidence of discrimination as opposed to mistake.

Once the trial in a disparate treatment case is over, the question is whether the employer intentionally discriminated against the employee on account of race or another characteristic covered by the statute. The employee bears the burden on this subject, and the rules governing prima facie cases, order of proof, responses, and so on no longer matter. *Postal Service v. Aikens*, 460 U.S. 711, 715 (1983); *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 480 (7th Cir. 1986). Pollard did not have direct evidence of discrimination. (The court excluded as hearsay the only proffer, and this was not erroneous.) Pollard also produced none of the usual forms of indirect evidence, such as statistics or comparable cases. Nothing in the record of the case hints that Rea discharges or disciplines

black employees more frequently or more severely than white employees. So far as the record shows, no white employee has ever missed five consecutive days without medical documentation and been allowed to remain. Indeed, the collective bargaining agreement between Rea and the union provides that an employee who misses five consecutive days "without permission" "shall" be fired. The only other employees discussed at the trial were two white workers who missed five or more days and *were* fired. Cf. *Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir. 1985) (finding much stronger comparative evidence insufficient as a matter of law).

The district court's decision rests on the proposition that if the employer offers a pretextual explanation for its conduct, this permits an inference of discrimination. Such an inference may be drawn. *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir. 1987). If the employer is trying to hide its real reason, that effort—coupled with the evidence making up the employee's prima facie case—may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory. See also *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (en banc). When the reason advanced at trial is nothing but a "pretext for discrimination", *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), to show "pretext" is to show "discrimination".

Showing that the employer dissembled is not necessarily the same as showing "pretext *for discrimination*", however; as we stressed in *Benzies*, it may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement. See also, e.g., *Maguire v. Marquette University*, 814 F.2d 1213, 1216-18 (7th Cir. 1987); *Sherkow v. Wisconsin*, 630 F.2d 498, 502 (7th Cir. 1980) (both stressing that the plaintiff must show not only a false reason but also a causal chain in which race or another forbidden criterion plays a dispositive role). It is easy to

confuse "pretext for discrimination" with "pretext" in the more common sense (meaning any fabricated explanation for an action), and to confound even this watery use of "pretext" with a mistake or irregularity. That is what happened here. The district judge did not conclude that Rea had advanced a "pretext for discrimination"; the court found instead that Rea did not have good cause to fire Pollard. Such a finding does not show pretext in any use of that term, which requires hiding the truth. If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a "pretext".

Rea's managers suspended Pollard on July 30 and tried to find out from airlines and tourist bureaus whether Pollard went to Las Vegas. The investigation went nowhere. Rea then fired Pollard anyway, because of the confluence of his request for leave, his weightlifting during an earlier absence, and his failure to produce a physician's report. The district court found that Susan Vachon, Rea's personnel manager who fired Pollard, "believed that Pollard took the week of July 23, 1984 off to attend the body building event." Among the related findings: "Vachon did not believe that Pollard's ankle was injured." "The management at Rea did not believe that Pollard had an ankle injury" (footnote omitted). "The management of Rea did not believe Pollard because of an earlier incident involving a back injury, and because Pollard's injury coincided with requested leave, which was denied." "The evidence shows that Pollard's reason for being absent was true, despite Vachon's belief to the contrary." In other words, the district judge found that the management at Rea correctly described its motivation, although its decision was based on an incorrect belief. A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination. See *Bechold v. IGW Systems, Inc.*, 817 F.2d 1282, 1285 (7th Cir. 1987) (when the employer advances a reason unrelated to a characteristic covered by the statute, the issue "becomes one of credibility in determining whether the belief is genuinely held"

rather than whether the belief is correct); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1426 (7th Cir. 1986).

Because the district court confused mistake with "pretext", its decision may not stand. Still, we must decide whether to remand for more proceedings. We do not remand, because the finding that Vachon and the other managers believed that Pollard was able to work the week of July 23 ends the case. The plaintiff must show intentional discrimination. A finding directly on the question of motivation is dispositive. The district court did not say that Rea's managers acted with a dual motive in which race played some role. None of the district court's resolutions of factual disputes is clearly erroneous, and there is no need for a new trial; the existing findings simply require a judgment for Rea.

The district judge quoted *Burdine*'s statement that the plaintiff must show that the employer's explanation is "unworthy of credence" (450 U.S. at 256), and parts of the district court's opinion imply that this is different from "pretext". It is not; these are two different ways to phrase the question whether the employer gave an honest explanation of its behavior. At all events, none of the grounds on which the district court inferred discrimination, singly or collectively, supports an inference that Rea discriminated against Pollard. To the extent the district judge drew that inference from his own findings, the inference is clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90 (1982).

The court found, for example, that the two white employees fired for missing a week's work also lied about their whereabouts and activities, which Pollard had not done. But as the court found that Rea's managers *thought* Pollard had lied, the fact that the other two employees actually had lied is of no moment. Rea fired everyone, regardless of race, who missed five days' work and (Rea believed) lied about the reasons. The court's related observation that if Rea were relying on the clause in the collective bargaining agreement it should have fired rather than suspended Pollard on July 30, also does not show

discrimination, for the same reason. A discharge is likely to end in arbitration; Rea's effort to document a second reason (deceit as well as failure to supply a medical excuse) no more shows pretext than a court's resort to a second ground of decision shows consciousness that the first is wrong.

Other features of Pollard's treatment do not support an inference of discrimination. Rea does not have written procedures establishing how employees obtain permission to miss work and what is a good excuse, and Rea did not tell Pollard during the meeting of July 30 that he should secure a physician's explanation. The lack of written rules affects employees of all races. Pollard does not maintain (and the district judge did not find) that Rea ever told any employee, of any race, to bring in an excuse. Rea says that all employees knew of the excuse rule and that Pollard could not have produced a satisfactory excuse because the employee must visit the physician during the absence. That is, the employee must be under the physician's care during the absence. The district court did not disbelieve Rea's assertions on these matters. Pollard concedes that he did not visit a physician during the week of July 23, so it was apparently too late for him no matter what Rea told him on July 30. There was, finally, a point system under which employees were penalized for absences; Pollard did not have enough points under this system to require discharge, because consecutive days of absence were treated as a single day's absence for purposes of awarding points. Yet the district court also did not conclude that any white employee had been treated better under this system than Pollard was, and a mistake (if there was one) in the implementation of neutral rules is not discrimination.

In the end, the district judge believed that Rea was not well run (it had no written rules on absences, did not ask Pollard to bring in an excuse, and tolerated an inconsistency between the rule in the collective bargaining agreement that requires discharge for missing five days and a point system that does not) and as a result of a

coincidence (Pollard's request for leave the week of July 23) erred in not believing Pollard's excuse. An arbitrator who came to these conclusions could order Pollard reinstated with back pay. A district judge does not sit in a court of industrial relations. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and §1981 do not interfere. Cf. *Graefenhain v. Pabst Brewing Co.*, No. 85-3094 (7th Cir. June 26, 1987), slip op. 13-14 (same principle under ADEA). Unless Pollard's race mattered—unless he would have been kept on if he were white—he is not entitled to relief. Under the view implied by the district court's decision, every black employee fired without just cause is entitled to recover. Because Title VII and §1981 protect whites as well as blacks, see *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), any white employee fired without just cause also may recover. Neither statute permits this conclusion. The employee must show that race is the dispositive factor. *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 462 (7th Cir. 1986). Pollard did not.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

§2000e-2 Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from his membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or to classify or fail or refuse to refer for employment

any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the

normal operation of that particular business or enterprise, and (2) it shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such, school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to any individual who is a member of the Communist Party of the United States or any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National Security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ an individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall be an unlawful employment practice for an employer to apply different standards of compensation, of different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not be granted on account of existing number of percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, §703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109.